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No. 95-6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

WILLIAM J. HILES,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, Fifth Judicial District

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a railroad employee who goes between two railroad cars to straighten a misaligned drawbar and is thereby injured is entitled to judgment as a matter of law under the Safety Appliance Act, 49 U.S.C. § 20302(a)(1)(A), even if there is no evidence that the drawbar was defective.

LIST OF PARTIES AND RULE 29.6 LIST

The only parties to this proceeding are the petitioner Norfolk & Western Railway Company and the respondent William J. Hiles.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Norfolk & Western Railway Company states that it is a subsidiary of the Norfolk Southern Corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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BRIEF FOR PETITIONER

OPINIONS BELOW

The judgment of the Circuit Court, Third Judicial Circuit, Madison County, Illinois, Pet. App. at 9a-10a, is not reported. The opinion of the Appellate Court of Illinois, Fifth District, *id.* at 1a-7a, is reported at 644 N.E.2d 508. The order of the Illinois Supreme Court denying petitioner's petition for leave to appeal, *id.* at 8a, is not reported.

JURISDICTION

The judgment of the Illinois Appellate Court, Fifth Judicial District, was entered on December 29, 1994. Pet. App. at 1a-7a. The Illinois Supreme Court entered its Order Denying Petition for Leave to Appeal on April 5,

1995. *Id.* at 8a. The petition for a writ of certiorari was filed on June 30, 1995, and was granted on September 27, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

During the period relevant to this case, Section 2 of the Safety Appliance Act ("SAA") provided in pertinent part:

> [I]t shall be unlawful for any . . . common carrier [engaged in interstate commerce by railroad] to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

45 U.S.C. § 2. Congress revised the provision effective July 5, 1994 and transferred it to 49 U.S.C. § 20302(a), which states in relevant part:

> [A] railroad carrier may use or allow to be used on any of its railroad lines—
>
> (1) a vehicle only if it is equipped with—
>
> (A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles . . . .

In amending the statute, Congress expressly provided that it did not intend to effect any "substantive change in the law" nor did it mean to "impair the precedent value of earlier judicial decisions and other interpretations." H.R. Rep. No. 180, 103d Cong., 2d Sess. 5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 822. For convenience, petitioner will refer to the current version of the statute, 49 U.S.C. § 20302(a).

STATEMENT OF THE CASE

1. Respondent William J. Hiles, an employee of petitioner Norfolk & Western Railway Company, was a member of a switching crew at petitioner's Luther Yard in St. Louis, Missouri. Appeals Record ("R.") at C250, C256. His duties on July 18, 1990, included coupling and uncoupling railroad cars and aligning drawbars. Report of Proceedings, Jury Trial ("Tr.") at 159, 188-89.

Railroad cars are connected, or coupled, by mechanisms located at both ends of each car. A coupling mechanism consists of a knuckle, which is a clamp that opens and closes, joined to the end of a drawbar. *Id.* at 45-46. This drawbar is fastened to a housing mechanism on the car. When two cars come together, the open knuckle of one car engages the knuckle on another car, and the cars couple automatically. *Id.* at 44.

In order for coupling to take place, the drawbars of the cars must be aligned to connect on impact. R. at C257; Tr. at 44. If they are not aligned before coupling, the knuckles will pass and not contact each other, and the cars will not couple. All drawbars are designed to have some lateral play. If the cars were joined by rigid drawbars, moving cars would derail on a curved track. Because of this necessary lateral movement, drawbars may become misaligned, or "slued," and remain in that position when uncoupled on a curved track. *Id.* at 45, 52. When such misalignment occurs, drawbars must be realigned manually. Manual alignment of a drawbar requires an employee to go between the cars to straighten the bar; there is not now and never has been an automatic alignment device in common use in the railroad industry. See *Lisek* v. *Norfolk & W. Ry.*, 30 F.3d 823, 831 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995); *Reed* v. *Philadelphia, Bethlehem & New Eng. R.R.*, 939 F.2d 128, 130 (3d Cir. 1991).

2. The equipment involved in coupling railcars has been regulated by the federal government under the Safety

Appliance Act since 1893. Before passage of the SAA in 1893, there was no federal requirement that couplers on railroad cars be uniform, and railroads across the country had their railcars equipped with a variety of different mechanisms. There existed at that time approximately 7,000 patents on automatic couplers, and 37 different types were in use. S. Rep. No. 1049, 52d Cong., 1st Sess. 5-6 (1892).

Many cars used a "link and pin" system that required employees to go between the cars to guide an iron link into a slot on the approaching car and to drop a loose pin through the link to hold it in place. See *United Transp. Union* v. *Lewis*, 711 F.2d 233, 246 (D.C. Cir. 1983) (photograph of trainman between two cars manually coupling a link and pin coupler). "Certainly it has been proven by experience, and long experience, that the common cars . . . coupled with links can not be coupled and uncoupled in practice in any other way, except by going between the cars." 24 Cong. Rec. 1417 (1893) (statement of Sen. McPherson). Other cars were furnished with various *automatic* couplers. One switchman testified to the Senate Committee on Interstate Commerce:

> You want to understand that the switchman's life in the day time has an even chance, but the man who works after dark has not the ghost of a show under the present system of things. All he has is a little bit of a hand lantern which throws a light 10 or 20 feet. He goes in to make a coupling, and he does not know the conditions that exist there. He does not know whether it is a Janney or a Hinson, a Dawling, a Drexel or some other kind of a draw-bar.

S. Rep. No. 1049, 52d Cong., 1st Sess. 5 (1892).

The couplers of railroad cars reaching interchange points with other railroad lines therefore did not automatically couple before the SAA's mandate, and railroad employees had to go between railroad cars while the cars were moving together in order to couple the cars manually. See 24 Cong. Rec. 1280 (1893) (statement of Sen. Chandler). In addition, when the SAA was enacted, there were coupling devices in use which, while coupling automatically by impact, required brakemen to go between the cars to *un*couple them by hand. *United Transp. Union*, 711 F.2d at 244.

Going between two cars to couple or uncouple them while they are moving is particularly dangerous. As one Senator described the situation during the floor debates:

> A railroad employe[e] . . . is asked to step inside the track, stand up against a car which is not moving, and watch the coming of another car, which is being pushed steadily up against the car near which he stands . . . . I doubt whether there is a Senator here who can stand deliberately and see a long train coupled in the way the coupling is now done without turning his eyes away as two cars come together just before it is the duty of the car-coupler to make the connection and then get out of the way.

24 Cong. Rec. 1280 (1893) (statement of Sen. Chandler). In 1890 President Benjamin Harrison urged Congress to pass legislation "looking to uniformity and increased safety in the use of couplers and brakes upon freight trains engaged in interstate commerce." S. Rep. No. 1049, 52d Cong., 1st Sess. 3-4 (1892). What is now § 20302 (a)(1)(A) was enacted to ensure that coupling equipment was compatible and interchangeable nationwide. See S. Rep. No. 1049 at 6; H.R. Rep. No. 1678, 52d Cong., 1st Sess. 3 (1892).

3. On July 18, 1990, respondent was working as a switchman at petitioner's railyard along with Larry Fauver, a conductor. R. at C250, C255-56. At approximately 4:00 a.m., respondent was walking along the tracks, examining drawbars to determine if they were properly aligned, when he noticed a car with a misaligned drawbar. *Id.* at C258-59. The car, No. TTBX-966015, was a bi-level SA-Auto Rack rail car used to

transport automobiles and was at that time coupled to another car. R. at C459; J.A. at 13, 24; Tr. at 44. There was a curve at the north end of the area where the car was located. R. at C260.

Fauver testified at trial that when he uncoupled the cars, the drawbars were misaligned. J.A. at 24. This uncoupling must have taken place on a curve where the drawbars would have remained misaligned when the car stopped. Then a locomotive pulled the car forward, and the slued position of the drawbar did not change. Fauver testified that both he and respondent then went "between" the two cars, which were four or five car lengths apart and not moving, to straighten the misaligned drawbar. Tr. at 48. Respondent was pulling the drawbar towards him while Fauver was pushing it in an attempt to straighten the bar. J.A. at 17-18. In circumstances that could not be more different than those that animated Congress's passage of § 20302(a)(1)(A), respondent injured his back during this process. *Id.*

4. Respondent filed suit on December 26, 1991, in the Circuit Court of Madison County, Illinois, alleging only that petitioner violated 49 U.S.C. § 20302(a)(1)(A). *Id.* at 4-5. The SAA makes it unlawful for a railroad to use any car not "equipped with . . . couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles." 49 U.S.C. § 20302(a)(1)(A).[1] Respondent included in his complaint no allegations of negligence that would have raised a claim directly under the FELA. J.A. at 4-5. Petitioner filed an Answer, *id.* at 6-7, and then an Amended Answer, raising the affirmative defense that any misalignment of the drawbar did not result from defective equipment. *Id.* at 8-9.

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[1] The Federal Employer's Liability Act ("FELA") renders railroads liable for a violation of the SAA. 45 U.S.C. § 51.

During trial, petitioner filed a Motion for Summary Judgment on the issue of liability, arguing that it had produced evidence that there was no defect in the drawbar alleged to have caused respondent's injury, and that respondent had produced nothing to controvert that evidence. R. at C559-61. The court denied this motion. J.A. at 22, 23. The court also denied petitioner's Motion for Directed Verdict at the close of respondent's case and at the close of all evidence. *Id.* at 20, 23. Instead, the court granted respondent's Motion for a Directed Verdict on the issue of petitioner's liability premised solely upon a violation of the SAA. *Id.* at 22.

Petitioner made two offers of proof that the misalignment of the drawbar was not caused by a defect in the equipment: the uncontradicted affidavit and testimony of Walter Miller, general foreman, *id.* at 10-11, 21, and the testimony of Larry Fauver, conductor, *id.* at 13-16. Miller testified that he inspected the drawbar at 5:40 a.m., less than two hours after the accident, and found that neither the coupler nor the drawbar was defective. Fauver testified that, at the time he uncoupled the rail cars, the drawbar on the car on which respondent was injured was misaligned. In addition, respondent testified at his deposition that he was unaware of any defect in the drawbar. R. at C291-92.

After the court decided liability adversely to petitioner, it directed a verdict and instructed the jury to deliberate solely on damages. J.A. at 25. The jury awarded respondent $492,500.00, and judgment was entered against the railroad on May 24, 1993. Pet. App. at 9a-10a.

5. The Fifth Judicial District of the Appellate Court of Illinois affirmed the Circuit Court on December 29, 1994. *Id.* at 1a. The appellate court explicitly recognized its duty to apply federal case law when interpreting the SAA. *Id.* at 4a. Nevertheless, the court followed only those federal court cases comporting with Illinois case law interpreting the SAA, see *Buskirk* v. *Burlington N., Inc.*,

431 N.E.2d 410 (Ill. App.), *cert. denied*, 459 U.S. 910 (1982); *Coleman* v. *Burlington N., Inc.*, 681 F.2d 542 (8th Cir. 1982); *Metcalfe* v. *Atchison, Topeka & Santa Fe Ry.*, 491 F.2d 892 (10th Cir. 1974), and affirmed the trial court's judgment. Pet. App. at 7a. The court held that "a railroad is liable as a matter of law" when an employee can show that two railroad cars failed to couple automatically, and that an employee went between those cars and was injured while attempting to realign a drawbar. *Id.* at 6a. The employee, held the court, is entitled to a directed verdict on liability regardless of whether the coupling equipment was defective. *Id.* at 7a. The Illinois Supreme Court denied review. *Id.* at 8a.

SUMMARY OF THE ARGUMENT

A.

Respondent has sued solely under the SAA, a federal law that requires railroad cars to be "equipped with . . . couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles." 49 U.S.C. § 20302(a)(1)(A). Respondent alleges that this language renders railroads *per se* liable whenever railroad employees go between railroad cars and are injured when working with the coupling mechanism. This interpretation, however, contradicts the SAA's plain language, which does not prohibit employees from going between cars to realign equipment that is not defective. The language focuses on safety equipment, not operating procedures.

B.

Congress's purpose in enacting § 20302(a)(1)(A) was to prescribe the use of certain safety equipment, and not to mandate or ban operating procedures such as going between two cars, even when the process happens to relate to coupling railroad cars. The SAA's legislative history shows that the 52d Congress was concerned about

the danger of switchmen coupling and uncoupling two cars while the cars were in motion, and did not mean to bar the act of going between cars, whether stationary or moving. In fact, Congress expressly directed the Secretary of Transportation to prescribe safety regulations for employees going "on, under, or between [rolling] equipment." 49 U.S.C. § 20131.

C.

Regulations promulgated by the Federal Railroad Administration ("FRA") show that operations requiring an employee to stand between two cars are clearly not prohibited. See 49 C.F.R. §§ 218.22(c), 218.39(a). These regulations contemplate situations in which railroad employees must go between two cars to perform their jobs, including adjusting couplers. The FRA requires certain procedures to be followed to increase safety in those situations, but obviously these regulations are inconsistent with imposing liability under the SAA for any injury to an employee who happens to be between two cars.

D.

This Court has previously held that a railroad cannot be found *per se* liable under the SAA if the coupling mechanism was not set properly and had no chance to couple. *Affolder* v. *New York, Chicago & St. L.R.R.*, 339 U.S. 96, 99 (1950). While *Affolder* involved a situation where closed knuckles prevented cars from coupling, its reasoning logically extends to misaligned drawbars. It establishes that, if the equipment was not properly set so that coupling would take place automatically upon impact, the railroad has a defense to liability. Thus, in this case, the necessity for pre-coupling manual alignment does not violate the Act. Moreover, whether or not the equipment was properly set or was defective is a question of fact, *Atlantic City R.R.* v. *Parker*, 242 U.S. 56, 59 (1916); *San Antonio & Aransas Pass Ry.* v. *Wagner*, 241 U.S. 476, 483-84 (1916), and petitioner

was improperly denied the opportunity to present that question to the jury.

E.

Where a railroad has statutorily required nondefective coupling equipment in place, it should not be held strictly liable for injuries that occur while employees prepare to couple cars. Drawbars become slued in the normal course of railroad car operations without defect, and there is no equipment commonly in use in the railroad industry that would align the drawbars automatically. Accordingly, employees must occasionally realign drawbars manually while standing between the railroad cars. In this case, petitioner had the proper equipment in place at the time of respondent's accident while he was manually realigning the drawbars. The railroad therefore was in compliance with the SAA because it had the statutorily required safety equipment installed. It is not for this Court to mandate the development of new equipment; instead, it should interpret the SAA as written. See *United States* v. *Seaboard Air Line R.R.*, 361 U.S. 78, 82 (1959).

F.

Permitting railroads to present evidence of nondefective equipment as a defense to an SAA charge will not deprive plaintiffs injured while working with coupling equipment of all remedies; they still may allege a claim under the FELA. But they will have to prove negligence, *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957), and will be subject to a defense of contributory negligence, which is reasonable when the injury is based on operational matters and not alleged equipment problems.

ARGUMENT

I. SECTION 20302(a)(1)(A) DOES NOT IMPOSE LIABILITY ON A RAILROAD FOR AN INJURY INCURRED BY AN EMPLOYEE WHILE REALIGNING A MISALIGNED DRAWBAR THAT IS NOT DEFECTIVE.

A. The Language Of § 20302(a)(1)(A) Does Not Prohibit Employees From Going Between Cars To Realign Equipment That Is Not Defective.

The SAA is a safety equipment statute. It does not prescribe particular operating procedures for railroads or their employees, and does not bar railroad employees from performing their duties between two stationary railcars. Instead, the Act compels railroads to equip their cars with certain types of couplers: those that will couple together automatically with other cars. The language of § 20302(a)(1)(A) of the SAA simply mandates the use of that equipment.

The precise section of the SAA states that a railroad may use on its lines "a vehicle only if it is *equipped with* . . . couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles . . . ." 49 U.S.C. § 20302(a)(1)(A) (emphasis added). These words are clearly directed at the type of equipment a railroad car must have. Even the title of the Act refers only to safety appliances and not railroad safety procedures in connection with the use of that equipment. The statute requires certain equipment, which will couple and uncouple automatically without employees going between the cars *during coupling and uncoupling*. It does not in terms prohibit the act of going between stationary cars to align drawbars before or after coupling occurs.

The language of the statute requires couplers that, first, couple on impact without employees having to go between cars, and second, can be uncoupled without employees having to go between cars. *Id.*; see also *O'Don-*

nell v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 387-88 (1949) (adding that couplers must also remain coupled until released). Nothing in that statutory sentence suggests that employees should never have to go between railcars to perform any duties. The language speaks specifically to coupling equipment's performance *during the coupling and uncoupling* of cars.[2] It does not describe how the equipment must function at other times when cars are hundreds of feet apart, and does not imply that employees will never have to *prepare* the equipment to couple—for example, by opening a closed knuckle or aligning a misaligned drawbar.

Section 20302(a)(1)(A) of the SAA was Congress's response to the danger of employees needing to stand between cars while the cars moved. One of the bill's purposes was "to provide against the necessity of the switchmen going in between the cars *to couple and uncouple*." 24 Cong. Rec. 1275 (1893) (statement of Sen. Cullom) (emphasis added). See *infra* at 14-15. The danger of workmen being crushed between two cars during coupling is what § 20302(a)(1)(A) was intended to eliminate. 24 Cong. Rec. 1367 (1893) (statement of Sen. McPherson).[3]

Moreover, the phrase "without the necessity of men going between the cars" is not a flat prohibition against

[2] "[I]t is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple and uncouple them . . . ." *Louisville & Nashville R.R.* v. *Layton*, 243 U.S. 617, 621 (1917).

[3] Section 20302(a)(1)(A) of the SAA has largely accomplished its purpose. In 1890, 369 railroad employees were killed and 7,842 were injured during coupling and uncoupling of railcars. H.R. Rep. No. 1678, 52d Cong., 1st Sess. 2 (1892). In 1993, one hundred years after the passage of the SAA, one railroad employee was killed and 136 were injured while coupling and uncoupling railcars. Accident/Incident Bulletin No. 162, U.S. Dep't of Transp., Fed. R.R. Ass'n Office of Safety, Tables 66 & 67 (June 1994).

any operational procedure that occurs between two railroad cars. Congress's dominant concern was not to eliminate altogether the action of going between the cars, but was instead to describe in the statutory language the process as it existed at the time the Act was passed: the process of coupling and uncoupling cars while standing between two moving railcars.

The Congress of 1893 did not even expressly prohibit employees from going between cars while coupling them: Cars had to be "equipped with couplers coupling automatically by impact, *and which can be uncoupled without the necessity of men going between the ends of the cars.*" 45 U.S.C. § 2 (emphasis added). This Court in *Johnson* v. *Southern Pacific Co.*, 196 U.S. 1, 18-19 (1904), reasonably interpreted that statutory language to apply to both coupling and uncoupling because Congress likely did intend to treat those two processes the same. However, if Congress had meant absolutely to prohibit employees from going between cars, it would have used far more clear language and at least would have connected the coupling process more expressly to the phrase "without the necessity of men going between the ends of the cars."

The stated purpose of the Act is "to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce *to equip their cars with automatic couplers* and continuous brakes and their locomotives with driving-wheel brakes." Act of March 2, 1893, ch. 196, 27 Stat. 531 (emphasis added); 24 Cong. Rec. 1246 (1893) (statement of Sen. Cullom) (emphasis added); S. Rep. No. 1049, 52d Cong., 1st Sess. 1 (1892) (emphasis added). That purpose is not served by the interpretation of the statute advanced by the court of appeals in this case.

B. Congress's Concern In Enacting The SAA And § 20302(a)(1)(A) Was To Improve Equipment Installed On Rail Cars, Not To Regulate Employee Operating Practices.

The intent to regulate equipment and not to prohibit an operation is revealed by the words Congress chose and is reinforced by a discussion of the provision as it moved through Congress. The legislative history demonstrates that it was not the purpose of § 20302(a)(1)(A) of the SAA to ban all instances of employees going between railroad cars or otherwise to restrict operating procedures. More specifically, Congress did not focus on preventing employees from going between stationary cars:

> I think very few people have lost their lives by coupling inventions between cars when they are at a standstill, but it is the continuous shifting and moving of cars in which the brakeman is expected to do the work under circumstances of great danger.

24 Cong. Rec. 1367 (1893) (statement of Sen. McPherson). A member of the National Committee on Safety Appliances testified similarly before the Senate Committee on Interstate Commerce regarding uncoupling:

> There [are] a number of devices that enable . . . uncoupling to take place from the side of the car. . . . In a number of these types there are devices on the side of the car by which the knuckle can be opened when the cars are apart, so that switchmen need not go between the cars, never mind how far they are apart. Of course if the cars are a considerable distance apart and are not moving there is no particular danger. He goes in and opens the knuckle with his hand.

Automatic Couplers and Power Brakes: Hearings Before the Senate Committee on Interstate Commerce, 52d Cong., 1st Sess. 14 (1892) (testimony of W.E. Rodgers). In addition, Congress could not have seen the ultimate risk

as railroad employees going between cars because the SAA independently requires cars to be equipped with air brakes, 45 U.S.C. §§ 1, 9 (now codified at 49 U.S.C. § 20302); *Fairport, Painesville & E.R.R.* v. *Meredith*, 292 U.S. 589, 592-93 (1934), that depend on workmen going between stationary cars on the rails to connect the air hoses for the air brakes. See 49 C.F.R. § 218.39(a).

If Congress had intended § 20302(a)(1)(A) to prohibit employees engaged in any aspect of coupling from going between cars, it never would have enacted 49 U.S.C. § 20131. In that section, Congress expressly directed the Secretary of Transportation:

> to prescribe regulations and issue orders that may be necessary to require that when railroad carrier employees (except train or yard crews) assigned to inspect, test, repair, or service rolling equipment *have to work on, under, or between that equipment*, every manually operated switch . . . providing access to the track on which the equipment is located is . . . secured by an effective locking device . . . .

49 U.S.C. § 20131 (emphasis added). While providing for improved safety in these operations, Congress clearly envisioned employees going between cars to perform certain duties.

C. The FRA's Regulations Clearly Permit Employees To Go Between Cars And Thus Reflect Congress's Intent Solely To Regulate Equipment Safety, Not Operations.

Consistent with Congress's expressed intent to regulate equipment, the FRA's regulations demonstrate that operations requiring an employee to stand between two cars are not *per se* impermissible. Current regulations of the FRA provide for railroad employees to go between cars safely to adjust couplers. See 49 C.F.R. §§ 218.22, 218.39(a).

The Department of Transportation, which is the agency charged with enforcing the SAA through the FRA, 49

U.S.C. § 20103(a), quite clearly does not prohibit the act of going between two cars. FRA regulations describe situations in which employees, in the normal course of their duties, must go between two cars to perform certain functions, including adjusting couplers. The agency's interpretation is entitled to weight in determining congressional intent. *Baltimore & Ohio Ry.* v. *Jackson*, 353 U.S. 325, 330 (1957); *Davis* v. *Manry*, 266 U.S. 401, 405 (1925). And the agency's view plainly restricts the scope of § 20302(a)(1)(A) more narrowly than the courts below.

For example, the FRA, regulating operations in a "hump yard," or yard with one elevated track branching into many tracks at a lower elevation, mandates that "[w]hen a train or engine service employee is required to couple an air hose or *to adjust a coupling device* and that activity *will require that the employee place himself between pieces of rolling equipment*," the switch operator must be so notified to prevent injury to the employee between the cars. 49 C.F.R. § 218.39(a) (emphasis added).

In the proposed rulemaking leading to 49 C.F.R. § 218.39(a),[4] the FRA and the Department of Transportation explained the coupling procedure: After a group of cars has gone down the hill at the hump yard into the "bowl tracks" at the bottom, a crew of employees "couples the cars and connects the airhoses between them" so that they will move as a unit. 48 Fed. Reg. 45,272, 45,272 (1983). "In performing these tasks, members of the yard crew *must position themselves between the cars . . . .*" *Id.* (emphasis added). The rule requires that such employees be protected "when engaged in coupling air hoses or adjusting coupling devices, *which activities demand that they place themselves between rolling equipment*. This rule would apply to components of these two general tasks, *e.g., . . . adjusting drawbars.*" *Id.* at 45,273 (emphases added).

[4] The final, unchanged rule became effective March 23, 1984. 49 Fed. Reg. 6495, 6497 (1984).

Another FRA regulation provides protection for utility employees "working on, under, or between railroad rolling equipment." 49 C.F.R. § 218.22(c)(5). The description in the Federal Register of the final rule states that it was promulgated to protect railroad employees "whose activities require them to work on, under, or between [rolling] equipment" on a variety of jobs. 58 Fed. Reg. 43,287, 43,288 (1993).

Thus, the FRA plainly envisions that employees must go between railroad cars during the course of their duties and that to do so does not constitute a *per se* violation of the statute. Instead, the FRA has provided for improved safety requirements when employees must go between cars to adjust couplers or to perform other jobs. Unless the FRA's regulations are invalid, the SAA does not bar altogether the operation of going between the cars.

D. This Court's Decisions Interpreting § 20302(a)(1)(A), Particularly *Affolder*, Clearly Show That The Provision Does Not Prohibit An Employee From Realigning A Drawbar That Is Not Defective.

This Court has interpreted the SAA as a safety equipment statute, not an operational statute. "Liability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation follows from the unlawful use of prohibited defective equipment 'not from the position the employee may be in or the work which he may be doing at the moment when he is injured.'" *Coray* v. *Southern Pac. Co.*, 335 U.S. 520, 523 (1949) (quoting *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10, 16 (1938)). The SAA's "prime purpose" is "the protection of employees and others *by requiring the use of safe equipment.*" *Lilly* v. *Grand Trunk W.R.R.*, 317 U.S. 481, 486 (1943) (emphasis added).

Consistent with that characterization of the SAA, the necessity of manual adjustment of a drawbar is not a *per se* violation of the Act. That argument for liability

was effectively rejected by this Court in *Affolder* v. *New York, Chicago & St. Louis Railroad*, 339 U.S. 96 (1950). In *Affolder*, two cars had failed to couple, and the plaintiff lost his leg in his attempt to board and stop the cars from rolling down the track. *Id.* at 97. The *Affolder* Court held that

> to equip a car with a coupler which failed to perform properly "in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom" . . . .
>
> *Of course this assumes that the coupler was placed in a position to operate on impact.* Thus, if "the failure of these two cars to couple on impact was because the coupler on the Pennsylvania car had not been properly opened," the railroad had a good defense.

Id. at 99 (emphasis added) (citations omitted). Justice Jackson, dissenting over the lack of clarity of the jury instructions, agreed with the majority's statement of the law: "Before a failure to couple establishes a defective coupler, it must be found that it was *properly set so it could couple. If it was not adjusted as such automatic couplers must be, of course the failure is not that of the device.*" *Affolder*, 339 U.S. at 101 (Jackson, J., dissenting) (emphasis added); see also *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 434 (1949).

This Court in *Affolder* did not limit its holding merely to the positioning of the knuckles, which was at issue in that case. Instead, the Court referred more generally to placing the coupler "in a position to operate on impact." *Affolder*, 339 U.S. at 99. The Court noted that counsel for both parties had argued that the issue "was whether, *after* the couplers were placed in *open or proper position*, they failed to couple automatically on impact." *Id.* (emphases added). The Court recognized that the need to "position" a coupler to operate on impact does not violate the SAA; the Court's analysis contemplates normal

manual adjustment of couplers to permit automatic coupling to occur on impact.

Although the Court did not reach the precise question of drawbar misalignment, the *Affolder* requirement of "properly set" logically includes properly aligned drawbars. A misaligned drawbar on a coupler is directly analogous to an unopened knuckle on a coupler—they are both frequent causes of failed coupling that normally are not due to defective machinery. *Reed* v. *Philadelphia, Bethlehem & New Eng. R.R.*, 939 F.2d 128, 132 (3d Cir. 1991). In both cases, a failure to couple may not be caused by defective equipment but by vibration of the car or human error in failing to open a knuckle or align a drawbar, and is therefore not a violation of the SAA.[5]

Given that the Court's reasoning in *Affolder* allows a railroad to present a defense that its equipment was non-defective and simply not set properly, the validity of that defense in any given case is a question of fact for the jury to decide. *Atlantic City R.R.* v. *Parker*, 242 U.S. 56, 59 (1916); *San Antonio & Aransas Pass Ry.* v. *Wagner*, 241 U.S. 476 (1916); *cf. Myers* v. *Reading Co.*, 331 U.S. 477, 482-84 (1947) ("A railroad subject to the [SAA] may be found liable if the jury reasonably can infer from the evidence merely that the hand brake which caused the injuries . . . was not an 'efficient' hand brake.").

In *San Antonio Railway*, for example, this Court found that there was enough evidence for the jury to have concluded that certain couplers were "in bad repair" and "*for*

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[5] The SAA imposes an absolute duty on railroads to comply with its provisions, and a railroad's exercise of care is irrelevant. *See, e.g., O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390-91 (1949); *Myers* v. *Reading Co.*, 331 U.S. 477, 482 (1947); *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10, 15 (1938). No matter how strict that requirement may be, the railroad still must retain the ability to present the affirmative defense that it *did* comply with the mandate of the SAA and its equipment performed as required.

this reason they did not measure up to the [SAA] standard . . . for such equipment." *San Antonio Ry.*, 241 U.S. at 482-83 (emphasis added). This Court in *Atlantic City* stated clearly that "[i]f couplers failed to couple automatically upon a straight track it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling was not needed, and that, *in the absence of any explanation believed by them,* the failure indicated that the railroad had not fully complied with the law." *Atlantic City,* 242 U.S. at 59 (emphasis added). Clearly, the Court envisioned that the railroad is permitted to offer an explanation to the jury as to why a coupler failed, and the jury would weigh the evidence and decide whether the failure was caused by a defect in the equipment or a mere operational failure.

In the instant case, because the trial court directed a verdict against petitioner on the issue of liability, petitioner had no such opportunity to present to the jury the uncontested evidence that its equipment was nondefective and complied with SAA standards. This Court has never stated that the mere failure of a coupler to perform sustains a claim that the SAA was violated. See *San Antonio Ry.*, 241 U.S. at 484.[6] The defendant railroad should have the opportunity to show that a factor other than equipment failure or defect caused the failure to couple, or, in this case, caused the drawbar misalignment.

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[6] The evidence in this case does not even demonstrate a failure to perform. The coupler on the car at issue was in fact fastened to another car just before respondent attempted to realign the drawbar. *See supra* at 6. And there was no attempt to couple the drawbars before the accident because respondent decided to realign the drawbar based on his perception that it was "slued." This demonstrates how far the respondent's and court of appeals' theory of liability strays from the essential mandate and purpose of § 20302(a)(1)(A).

E. Respondent's Injury, Which Was Based Solely On A Claim That The SAA Was Violated By A Misaligned Drawbar, Is Not Covered By The Act When The Drawbar Was Not Defective.

1. From a practical standpoint, before two railroad cars can be coupled, the coupling equipment must be properly positioned: drawbars must be in alignment and knuckles must be open so that coupling can take place. In this case, a drawbar was misaligned so that the two cars apparently would not have coupled on impact, and the bar had to be aligned manually. The drawbar misalignment, however, was caused by normal movement of the railroad car, and not by any defect or malfunctioning of the equipment.

In relevant part, a railroad car must be "equipped with . . . couplers coupling automatically by impact." 49 U.S.C. § 20302(a)(1)(A). The car involved in respondent's accident was indisputably so equipped. The misaligned drawbar involved in the accident was misaligned due to normal operation of the car, and was not defective. Petitioner's evidence and offers of proof to that effect were undisputed at trial.

The trial court erred when it excluded evidence that the misaligned drawbar was not caused by defective equipment, and erred by denying petitioner's motion for directed verdict on the issue of its liability under the SAA. The modern and unbroken trend of federal appellate court decisions concurs that "the [SAA] was created to reduce the risks associated with coupling rail cars and not to require that drawbars be aligned perfectly at all times." *Goedel* v. *Norfolk & W. Ry.*, 13 F.3d 807, 812 (4th Cir. 1994).[7]

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[7] *See also Kavorkian* v. *CSX Transp., Inc.*, 33 F.3d 570 (6th Cir. 1994); *Lisek* v. *Norfolk & W. Ry.*, 30 F.3d 823 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995); *Reed* v. *Philadelphia, Bethlehem & New Eng. R.R.*, 939 F.2d 128 (3d Cir. 1991); *Maldonado* v. *Missouri Pac. R.R.*, 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480

The statute requires automatic *coupling*, not automatic *realignment* which did not exist in 1893 and is only in experimental use today. Respondent's standard would penalize railroads for normal operations unquestionably in compliance with the SAA's equipment requirements.

2. The existence of misaligned drawbars does not mean that coupling equipment is defective. Drawbars often become misaligned "by the normal jarring and vibrations of the railroad car or when the car is uncoupled on a different track . . . ." *Kavorkian* v. *CSX Transp. Inc.*, 33 F.3d 570, 575 (6th Cir. 1994); *United Transp. Union* v. *Lewis*, 711 F.2d 233, 235 & n.5 (D.C. Cir. 1983). Moreover, this Court has recognized that, as a practical necessity, drawbars must have lateral play. *Atlantic City R.R.* v. *Parker*, 242 U.S. 56, 59 (1916). In order for railroad cars to transverse a curved track without derailing, the drawbars holding those cars together must have some lateral play. Normal drawbar misalignment is both essential and beneficial to the proper functioning of railroad cars; it does not constitute a defect.

Inevitably, then, nondefective railroad car drawbars will occasionally need alignment. The alignment of drawbars is still required from time to time, even with modern coupling equipment. This alignment can only be accomplished by a railroad employee going between the rails to move the drawbar manually. *Reed* v. *Philadelphia, Bethlehem & New Eng. R.R.*, 939 F.2d 128, 130 (3d Cir. 1991); *Kavorkian*, 33 F.3d at 571. In fact, equipment for automatic alignment remains experimental and is far from common usage in the industry. Br. of Assoc. of Am. Railroads as *Amicus Curiae* in Supp. of Pet. at 10-11; *Goedel*, 13 F.3d at 809; *Lisek* v. *Norfolk & W. Ry.*, 30 F.3d 823, 825 & n.2 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995); *Metcalfe* v. *Atchison, Topeka & Santa Fe Ry.*, 491 F.2d 892, 896 n.2 (10th Cir. 1974); *Reed*, 939 F.2d at 130 & n.1.

U.S. 932 (1987); *cf. United Transp. Union* v. *Lewis*, 711 F.2d 233 (D.C. Cir. 1983).

The Congress of 1893 could not have meant to mandate the use of nonexistent equipment and to require that drawbars could never be manually aligned in preparation for coupling. This Court should refuse to "accept[] a reading of section 2 that would be tantamount to a pronouncement that 99% of all railroad cars violate section 2—and have done so for the entire 90 years the Act has been in effect." *United Transp. Union*, 711 F.2d at 251 n.39.

The question at the core of this case is whether the existence of nondefective misaligned drawbars violates the SAA as written, not whether railroads should develop new technology to align drawbars automatically. See *United States* v. *Seaboard Air Line R.R.*, 361 U.S. 78, 82 (1959) ("[I]t is not for courts to determine in particular cases whether this safety measure is or is not needed. Congress determined the policy that governs us in applying the law."). Indeed, this Court has held that it was not the intent of the SAA to require the *invention* of equipment, but instead to require the installation of pre-existing safety appliances. *Southern Ry.* v. *Crockett*, 234 U.S. 725, 737 (1914). In sum, "[i]f it is normal for nondefective automatic couplers to become misaligned as a part of ordinary railyard operations, then it is simply not reasonable to hold that such misalignment amounts to a violation of the Act," creating *per se* liability. *Lisek*, 30 F.3d at 830-31.

3. The evidence at trial, and petitioner's offers of proof made out of the presence of the jury, demonstrated that petitioner had the proper equipment in place at the time of the accident and that automatic couplers were in fact properly installed on the railroad car. Respondent presented no contrary evidence that the coupler was defective, and, in fact, all of the evidence regarding the condition of the coupler tended to show that no defect existed. Accordingly, petitioner was entitled to judgment as a matter of law.

Walter A. Miller, Jr., General Foreman at Norfolk Southern Corporation, inspected the railroad car and coupler, which respondent claims caused his injury, less than two hours after the accident. J.A. at 10, 21. Mr. Miller, with 20 years of experience in the railroad industry, concluded that the coupler was not defective, and met the Association of American Railroads guidelines published in its Interchange Rules. *Id.* at 10-11, 21. When Mr. Miller made an offer of proof out of the presence of the jury, he reiterated that he found no mechanical defect in the drawbar of the coupling mechanism on the car involved in respondent's accident. *Id.* at 21.

Respondent did not dispute petitioner's evidence at trial tending to show that the drawbar at issue was non-defective. In his responses to deposition questions, respondent stated that he did not know what caused the drawbar's misalignment and was unaware whether it was due to a factor other than equipment failure or defect. R. at C291. Respondent declared that he did not know if there was anything about the drawbar's alignment that indicated to him that it was defective or needed repair. *Id.* at C292. He saw nothing to indicate that the misalignment was due to a factor other than a defect, nor did Mr. Fauver mention anything to respondent that indicated that the misalignment was due to something other than a defect. *Id.*

In this case, there was no prior impact or failed coupling before the accident occurred. Instead, respondent and Conductor Fauver saw the misaligned drawbar, decided that it would prevent coupling, and tried to straighten it before any attempt at coupling. Slued drawbars requiring manual alignment can occur whether or not there was an attempt to couple; this factor should not be determinative in deciding whether the SAA has been violated. It should not make a difference to a railroad's liability if its employee decides that a drawbar is sufficiently straight to couple and makes a failed attempt, and *then* is injured

in attempting to align the bar, or if the employee judges that the drawbar is too slued to couple and is injured while aligning.[8]

F. Construing The SAA Not To Cover Respondent's Claim Will Not Deprive Employees Of A Remedy For Any Injuries Caused By A Railroad's Negligence In Its Operating Procedures For Aligning Drawbars.

Permitting railroads to present a defense that their equipment was not defective will not deprive railroad employees injured on the job, as the respondent allegedly was, of a remedy. Where a railroad is negligent in its operations or in failing to correct an equipment malfunction or in failing to comply with SAA standards, the railroad still would be liable under the FELA.[9] If this Court

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[8] The Illinois Appellate Court in this case stated that "[a]ll a plaintiff such as Hiles is required to show in order to obtain a directed verdict on the issue of liability is that: (1) railroad cars failed to couple automatically and (2) he went between the cars and was injured while trying to straighten a misaligned drawbar." Pet. App. at 7a. Respondent, too, advocated this position. In his motion for directed verdict, he stated that "the injured workman need only prove that he went between the cars after they failed to automatically couple, and that he was injured while aligning a misaligned drawbar." R. at C552. The trial court concluded that Hiles had met those requirements and was therefore entitled to a directed verdict. However, it is apparent from the record below—and undisputed by respondent—that there was *no* attempt to couple the railroad cars on the morning of July 18, 1990. Respondent has not even met his own, erroneous legal standard of showing a violation of the SAA, or demonstrating a defect in the drawbar.

[9] If a drawbar were *frozen* out of alignment, for example, that would certainly be a coupling defect and the railroad would face liability for an injury associated with that defect. *See Goedel* v. *Norfolk & W. Ry.*, 13 F.3d 807, 811 (4th Cir. 1994). Couplers somehow incapable of coupling on impact, perhaps those with broken or missing knuckles or knuckles that could not maintain a coupling, would be defective as well. FRA regulations define a defective coupler as one with "a coupler shank that is bent out of alignment to the extent that the coupler will not couple auto-

finds that railroads are strictly liable for all injuries incurred when drawbars are misaligned, then contributorily negligent railroad employees will be able to elude any evidence of their negligence at trial by suing exclusively under the SAA, as respondent has done here. See 45 U.S.C. § 53 (damages diminished under the FELA by employee's contributory negligence). Given that respondent's claim ultimately is based on operating procedures and not on equipment failure, the statutory scheme will be better served by permitting contributory negligence to be an issue in these cases.

Respondent declares that "the prime purpose of the SAA is the protection of employees from injury or death," and that "[t]he object of the SAA, being remedial and humanitarian, should not be construed as to defeat the above purpose." Resp. Br. in Opp. at 3. It is surely true that the SAA was passed to protect railroad employees from injury or death on the job, but that policy does not mean that the Act's protections are limitless, nor that the Act's plain language should be ignored so that employees prevail in every suit brought under the SAA. Nor does it mean that railroads must be deprived of the ability to raise the affirmative defense that they in fact complied fully with the statute.

FELA, intended to be a "broad remedial statute," is liberally construed in favor of railroad workers. *Atchison, Topeka & Santa Fe Ry.* v. *Buell*, 480 U.S. 557, 562 (1987). In a FELA action, the railroad is liable if its

matically." 49 C.F.R. § 215.123. If a coupler is warped out of shape as the regulation contemplates, then it is clearly structurally and mechanically defective—unlike simple misalignment which the employees can manually correct. In addition, if an injured employee could show that the railroad negligently failed to educate him regarding misaligned drawbars so that he was trying to realign one when it was unnecessary, or had failed to train him on the safest methods of realignment, then a railroad could be liable under the FELA for injuries resulting from those violations. 45 U.S.C. § 51. However, that is not the case here. Tr. at 160.

negligence "played any part, even the slightest, in producing the injury." *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957). A violation of the SAA creates liability under FELA if the violation contributes to the injury, regardless of whether that injury was one "the statute sought to prevent." *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 433 (1958). The employer owes the employee under FELA "the duty of complying with his statutory obligations." *Id.* at 439. However, if those statutory obligations are expanded beyond their purpose solely to guarantee a remedy, the employer will be faced with a standard far beyond that which Congress intended. Railroad employees justifiably have substantial protection under FELA, but to construe the SAA to deny railroads the legitimate defense that they have not in fact violated the statute is unnecessary for workers' protection.

To be sure, this Court has interpreted the SAA broadly regarding those employees to whom railroads owe a duty under the Act. *Coray* v. *Southern Pac. Co.*, 335 U.S. 520, 522-23 (1949); *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10, 16 (1938); but see *Crane* v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 167 (1969). However, the SAA should not be construed to state that a railroad cannot present evidence that its equipment was not defective, particularly if that construction goes against the plain language and regulatory understanding of the statute.[10] The SAA protects railroad employees from harm, but it is fundamentally about safety equipment standards for the railroads and carries no presumption of creating liability for every injury in the workplace. The double protection is unnecessary, and particularly inappropriate in this case where respondent *chose* to sue solely under the SAA and

[10] It is inconsistent with Congress's scheme that courts should interpret the concept of a mechanical defect loosely, particularly when the "defect" respondent alleges to exist was not a defect in 1893, and to allow a mere operational matter to masquerade as a defect.

to forgo his right to state a separate claim based on negligence for violation of the FELA.

CONCLUSION

This Court should reverse the judgment of the Appellate Court of Illinois, Fifth Judicial District.

Respectfully submitted,

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